IN THE SUPREME COURT OF THE STATE OF DELAWARE

ROBERT F. PIERCE and URSULA S. PIERCE,	)	
Plaintiffs Below Appellants,	)	No. 328, 1981
v.	)	
DONALD W. BIERER, JR., and DOVER VOLKSWAGEN, INC., a Delaware Corporation,	)	
Defendants Below, Appellees.	)	

Submitted: May 11, 1981
Decided: July 9, 1982

Before HERRMANN, Chief Justice, McNEILLY and QUILLEN, Justices.

Upon appeal from the Superior Court. Affirmed.

Joseph M. Bernstein (argued), Wilmington, for plaintiffs below-appellants.

Richard W. Pell and Jeffrey Marlin (argued), of Tybout, Redfearn, Casarino & Pell, Wilmington, for defendants below-appellees.

HERRMANN, Chief Justice:

In this appeal, the Court is asked to reconsider its decision in Justice v. Gatchell, Del. Supr., 325 A.2d 97 (1974), upholding the constitutionality of the Delaware Automobile Guest Statute [21 Del.C. § 6101 (a)].*

I.

The plaintiff, Robert Pierce, suffered injuries while a passenger in an automobile operated by the defendant Donald W. Bierer, Jr. and owned by Bierer's employer, defendant Dover Volkswagen, Inc. Pierce and Bierer were en route from a bar at 1:00 a.m. to a nearby restaurant. Their automobile was struck by a tractor-trailer.

A complaint was filed by Pierce alleging that the accident was caused by the ordinary

* 21 Del.C. § 6101(a) provides:
"§ 6101. Injury to nonpaying guest; exceptions as to passengers of public carriers and prospective purchasers of vehicles.
"(a) No person transported by the owner or operator of a motor vehicle, boat, airplane or other vehicle as his guest without payment for such transportation shall have a cause of action for damages against such owner or operator for injury, death or loss, in case of accident, unless such accident was intentional on the part of such owner or operator or was caused by his wilful or wanton disregard of the rights of others.

negligence or, in the alternative,"the wilful or wanton" conduct of Bierer. Defendants denied liability, pleaded as an affirmative defense the Guest Statute, and, following discovery, moved for summary judgment.

The plaintiff ultimately conceded both that he was a "guest without payment" under the Guest Statute and that his claim of "wilful or wanton" conduct was not substantiated by the facts. Thereupon, the Superior Court granted defendants summary judgment, citing Justice v. Gatchell, supra, in rejecting plaintiff's claim that the Guest Statute was unconstitutional.

II

In Justice, this Court considered the question of whether the Delaware Automobile Guest Statute is in contravention of the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution. This Court there carefully reviewed the various concepts under which the Guest Statute has been held to be in violation of the Equal Protection Clause in sev-

eral States, and found the question "fairly debatable." Exercising the judicial self-restraint in favor of the General Assembly, traditional in this State upon a "fairly debatable" conclusion as to the constitutionality of a State Statute (325 A.2d at 102), this Court held the Statute constitutional in Justice, stating:

> "If the Guest Statute has become unacceptably unwise and unfair under the current facts of life, it is for the General Assembly to act with respect to this Statute which it created more than 40 years ago. The wisdom of legislation is not within our realm; only the General Assembly may rectify legislation manifesting itself by hindsight as unwise . . . . For this Court to abolish the Guest Statute because of changed conditions would, in our view, amount to impermissible judicial legislation." 325 A.2d at 103.

The result in Justice was premised upon the proposition that the Connecticut Guest Statute had been upheld on equal protection grounds by the United States Supreme Court in Silver v. Silver, 280 U.S. 117 (1929), which still remained the last word by that Court on the subject.

The Plaintiffs contend that this Court should now abandon its position on the Guest

Statute in the light of what they view as a movement by the U.S. Supreme Court away from the "traditional" equal protection test previously applied by this Court in Justice on the basis of Silver. The plaintiffs argue that "the Supreme Court has redefined the role of the judicial branch vis-a-vis the legislature in passing on the constitutionality of statutes challenged under the 'traditional' equal protection test."

The plaintiffs further remind us of the comment in Justice: "If . . . the strictures of the Fourteenth Amendment [are to be] extended in this area of the law, we shall await the views of the United States Supreme Court on the subject. (325 A.2d at 102). Those views have been manifested, plaintiffs assert, in a number of recent cases all of which, they say, now require a reversal of Justice. Specifically, plaintiffs cite U.S.R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 101 S.Ct. 453 (1980); Minnesota v. Clover Leaf Creamery Company, 449 U.S. 456, 101 S.Ct. 715 (1981); Schweiker v. Wilson, 450 U.S. 221, 101 S.Ct. 1074 (1981); and Logan v. Zimmerman Brush Co., _____ U.S. _____, 102 S. Ct. 1148 (1982).

III.

We have reviewed the cited cases relied upon by the plaintiffs and find none to be controlling. None involves a Guest Statute of this or any other state and, therefore, cannot be said to bespeak a shift in the Supreme Court's viewpoint on the subject.

On the contrary, we find it significant that Silver, decided in 1929, still remains the last word by the U.S. Supreme Court on Automobile Guest Statutes in relation to equal protection rights. We find it quite significant that the U.S. Supreme Court, "for want of a substantial federal question," recently denied certiorari in connection with the Delaware Premises Guest Statute,* Bailey v. Pennington, 444 U.S. 1061,

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* The Premises Guest Statute, 25 Del.C. § 1501 provides: "§ 1501. Liability of owners or occupiers of land for injury to guests or trespassers.

"No person who enters onto private residential or farm premises owned or occupied by another person, either as a guest without payment or as a trespasser, shall have a cause of action against the owner or occupier of such premises for any injuries or damages sustained by such person while on the premises unless such accident was intentional on the part of the owner or occupier or was caused by the wilful or wanton disregard of the rights of others."

100 S.Ct. 1000 (1980), which was taken almost verbatim from the Automobile Guest Statute. The constitutionality of the Premises Guest Statute was upheld in Bailey v. Pennington, Del. Supr., 406 A.2d 44 (1979), in which an equal protection argument was rejected upon the basis of Justice.*

Accordingly, we find nothing has developed since Justice v. Gatchell to alter the stare decisis value of that case as to the constitutionality of the Automobile Guest Statute. We adhere to the rationale adopted and conclusions reached therein. If changes are to be made, the General Assembly must take the action.

* * *

Affirmed.

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* In Bailey, this Court again reminded all concerned:

"We remain convinced that the General Assembly, which created both of these Statutes [Automobile and Premises], must undo whatever evils or unfairnesses have arisen under them in modern day circumstances." 406 A.2d at 47.

STATE OF DELAWARE *
* SS.
KENT COUNTY *

I, T. E. Townsend, Jr., Clerk of the Supreme Court of the State of Delaware, do hereby certify that the foregoing is a true and correct copy of Opinion decided July 9, 1982 in Pierce v. Bierer, No. 328, 1981, as the same remains on file and of record in said Court.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Dover this 21st day of September 1982, A.D.

/s/ T.E. Townsend Jr.
T. E. Townsend, Jr.
Clerk of the Supreme Court

SEAL

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ROBERT F. PIERCE and URSULA S. PIERCE,	)	
Plaintiffs,	)	C.A. 80C-FE-63
v.	)	
DONALD W. BIERER, JR., and DOVER VOLKSWAGEN, INC., a Delaware Corporation,	)	
Defendants.	)	

Submitted: October 15, 1981
Decided: October 29, 1981

Joseph M. Bernstein, Esq.
Suite 820 Market Tower
Ninth and Market Streets
Wilmington, DE 19801

Richard W. Pell, Esq.
Tybout, Redfearn,
Casarino & Pell
P.O. Box 2092
Wil., DE 19899

On or about February 16, 1978, plaintiff, Robert Pierce and defendant Donald Bierer met in a bar at the Finish Line Tavern in Dover. They shared a pitcher of beer and then decided to go to a local restaurant for breakfast. They got into a car owned by Dover Volkswagen and operated by Bierer since he was a salesman for Dover Volkswagen. On the way to the restaurant the automobile was involved in an accident on

North State Street Extended. Plaintiff brings this action for damages.

The issue in this case is the constitutionality of the Guest Statute. Plaintiff agrees that he cannot substantiate the requirement of willful and wanton negligence. Therefore, he has attacked the constitutionality of the Guest Statute. As the Court stated at oral argument, this case is controlled by Justice v. Gatchell, Del. Supr., 325 A.2d 97 (1974). That case specifically dealt with the constitutionality of the Guest Statute. Plaintiff relied upon two additional cases, Minnesota v. Clover Leaf Creamery Co., 101 S.Ct. 715 (1981) and U.S.R.R. Retirement Board v. Fritz, 101 S.Ct. 453 (1980). The Court has reviewed these cases and finds that the factual allegations are completely opposite to the case in question and to the application of the Automobile Guest Statute.

Defendants Bierer and Dover Volkswagen's motion for summary judgment is therefore GRANTED.

/s/ VINCENT A. BIFFERATO

xc: Robert G.Carey, Esq.
Prothonotary, Law Library
Court Administrator, File

STATE OF DELAWARE *
* SS.
NEW CASTLE COUNTY *

I, GEORGE FISHER, Prothonotary of the Superior Court of the State of Delaware in and for New Castle County, do hereby certify that the foregoing is a true and correct copy of Opinion decided October 29, 1981 in Pierce v. Bierer, C. A. 80C-FE-63, as the same remains on file and of record in said Court.

IN TESTIMONY WHEREOF, I, have hereunto set my hand and affixed the seal of said Court at Wilmington this 24th day of September , A.D. 1982.

/s/ George J. Fisher
GEORGE FISHER

(SEAL)

MANDATE

THE SUPREME COURT OF THE STATE OF DELAWARE

TO THE HONORABLE THE JUDGES OF THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

GREETING:

WHEREAS, before you or some of you in a cause entitled as follows:

ROBERT F. PIERCE, ET AL.

vs. C.A. No. 80C-FE-63

DONALD W. BIERER, JR., ET AL

a certain judgment or order was entered on the 29th day of October, 1981 to which reference is made; and

WHEREAS, by appropriate proceedings the said cause was duly appealed to this Court, and after hearing has been finally determined, as appears from the opinion of this Court filed in the cause on July 9, 1982, a certified copy of which is attached hereto;

ON CONSIDERATION WHEREOF IT IS ORDERED AND ADJUDGED that the said judgment or order be and it

is hereby affirmed.

WITNESS the Honorable D. L. Herrmann our Chief Justice, at Dover, the First day of January, A.D. 1982.

Issued July 30, 1982

Supreme Court No. 328, 1981

/s/ T.E. Townsend, Jr.
Clerk of the Supreme Court

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ROBERT F. PIERCE and URSUAL S. PIERCE,	)	
Plaintiffis Below, Appellants,	)	
v.	)	No. 328, 1981
DONALD W. BIERER, JR., and DOVER VOLSKWAGEN, INC., a Delaware Corporation,	)	
Defendants Below, Appellees.	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

To: T. Edgar Townsend, Jr.
Clerk of the Supreme Court
Supreme Court Building
Dover, Delaware 19901

Notice is hereby given that Robert F. Pierce and Ursula S. Pierce, the Appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Delaware, which affirmed the granting of summary judgment of the Defendants Below, Appellees, entered in this action on July 9, 1982.

This Appeal is taken pursuant to 28 U.S.C. §1257(2).

/s/ JOSEPH M. BERNSTEIN
JOSEPH M. BERNSTEIN
Suite 820 Market Tower
Wilmington, DE 19801
Tel. No. (302) 658-9260
Attorney for Appellants

DATED: September 20, 1982

STATE OF DELAWARE *
* SS.
KENT COUNTY *

I, T. E. Townsend, Jr., Clerk of the Supreme Court of the State of Delaware, do hereby certify that the foregoing are true and correct copies of the Judgment [Mandate] entered by the Supreme Court of the State of Delaware July 30, 1982, and the Notice of Appeal to the United States Supreme Court filed on September 20, 1982 in Pierce v. Bierer, No. 328, 1981, as the same remains on file and of record in said Court.

IN TESTIMONY WHEREOF, I, have hereunto set my hand and affixed the seal of said Court at Dover this 21st day of September A.D. 1982

/s/ T.E. Townsend Jr.
T. E. Townsend, Jr.
Clerk of the Supreme Court

SEAL

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ROBERT F. PIERCE and URSULA S. PIERCE,	)	
Plaintiffs, Below,	)	
v.	)	No. 328, 1981
DONALD W. BIERER, JR., and DOVER VOLKSWAGEN, INC., a Delaware Corporation,	)	
Defendants Below, Appellees.	)	

PROOF OF SERVICE

AND NOW, this 20th day of September, 1982, I hereby certify that all parties required to be served have been served copies of the foregoing Notice of Appeal and that service was made on Appellees pursuant to U.S. Sup. Ct. Rule 28.3, 28 U.S.C.A. by mailing three copies via United States mail, with first-class postage prepaid, to Appellees counsel of record:

Richard W. Pell, Esquire
P. O. Box 2092
Wilmington, Delaware 19899

/s/ JOSEPH M. BERNSTEIN
JOSEPH M. BERNSTEIN
Suite 820 Market Tower
Wilmington, DE 19801
Tel. No. (302) 658-9260
Attorney for Appellants

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DANIELLE C. JUSTICE, et al,	)	
Plaintiffs Below Appellants,	)	No.
v.	)	
LOIS LORRAINE GATCHELL,	)	
Defendant Below, Appellee	)	

Argued: March 15, 1974
Decided: August 13, 1974

Before HERRMANN, C.J., DUFFY, J., and QUILLEN, Chancellor

Upon appeal from Superior Court. Affirmed.

James P. D'Angelo and William H. Bennethum, III, Wilmington, for Plaintiffs below-appellants.

Albert L. Simon, Wilmington, for defendant below-appellee.

HERRMANN, Chief Justice:

In this appeal, we are urged to strike down the Delaware Automobile Guest Statute [21 Del.C. § 6101(a)][1] as being in contravention of the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution.

I.

This action involves injuries received by the minor plaintiff, Danielle C. Justice, in an automobile accident. The suit is brought on her behalf by her father who, together with his wife, has also brought suit in their own right. The defendant in the action is the grandmother of Danielle. At the time of the accident, Danielle was a passenger in an automobile

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1. 21 Del.C § 6101(a) provides:

"§ 6101 Injury to non-paying guest; exceptions as to passengers of public carriers and prospective purchasers of vehicles

"(a) No person transported by the owner or operator of a motor vehicle. * * * as his guest without payment for such transportation shall have a cause of action for damages against such owner or operator for injury, death or loss, in case of accident, unless such accident was intentional on the part of such owner or operator, or was caused by his wilful or wanton disregard of the rights of others."

owned and operated by the defendant grandmother. The grandmother raised the Guest Statute as a defense. The plaintiffs moved for summary judgment asserting that the Guest Statute is inapplicable on the facts of the case and, in any event, is unconstitutional. The Superior Court denied the motion for summary judgment: this appeal by the plaintiffs followed.

The plaintiffs make three arguments. We address ourselves to the most important first.

II.

[1] The plaintiffs argue that the Delaware Automobile Guest Statute is violative of the Equal Protection Clause in that its denial of a cause of action to a non-paying guest injured through the negligence of the host driver, while permitting such a cause of action to a paying guest, establishes an arbitrary and invidious discrimination for which there is no rational basis. In support of that position, we are urged to follow Brown v. Merlo, 8 Cal.3d 855, 106 Cal.Rptr.

388, 506 P.2d 212 (1973). This has become the leading case in a new judicial trend inimical to Automobile Guest Statutes.

The present Delaware Automobile Guest Statute was enacted in 1933 (38 Del.L. Ch. 26).[2] At about the same time in the history of the evolution of the automobile, similar statutes were enacted in about half the States.[3] See 2 F. Harper and F. James, The Law of Torts, § 16.15, n.4 (1956).[4]

Over the years, almost universally until the advent of Merlo in 1973, Automobile Guest Statutes were upheld against constitutional at-

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2. It replaced 36 Del.L. Ch. 270, enacted in in 1929, which was declared unconstitutional in Coleman v. Rhodes, Del.Super., 5 W.W. Harr. 120, 159 A.649 (1932).

3. But not in our neighboring States of Maryland, Pennsylvania, or New Jersey.

4. Commentators have suggested that the chief argument for the creation of such statutes in the 1920's and 1930's was the protection of liability insurance companies against collusive litigation. See, e.g., Prosser, The Law of Torts § 34, p. 187 (4th Ed. 1971); White, The Liability of an Automobile Driver to a Non Paying Passenger 20 Va.L.Rev. 326, 332-333 (1934).

tack. Early in the game, our Guest Statute was brought under constitutional scrutiny in Gallegher v. Davis, Del. Super., 7 W.W. Harr. 380, 183 A. 620 (1936). It was there assailed as being violative of the "due course of law" provision of the Delaware Constitution, Art. 1, Sec. 9, Del.C.Ann.[5]. The holding in Gallegher, which has withstood the tests of time and challenge in this State, was that the Statute is constitutional. This conclusion was based principally upon Silver v. Silver, 280 U.S. 117, 50 S.Ct. 57, 74 L.Ed. 221 (1929). In Gallegher, the Court had this to say as to the purpose and intent of the then recently-enacted Guest Statute of 1933:

> " * * *.[T]he history and language of the act indicates sufficiently the legislative belief that the multitudinous actions brought by guest passengers in

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5. Del. Const., Art. 1, Sec. 9, provides in pertinent part:
" *** every man for an injury done him in his reputation, person, moveable or immoveable possessions, shall have remedy by the due course of law."

> automobiles against owners and operators, not infrequently the parties, plaintiff and defendant, being near relatives, presented so many instances of collusion, utter indifference to results because of protective insurance, perjury and consequent fraud upon the courts, as to constitute a serious public evil to be mitigated by defining the degree of care to be required of an automobile host to a guest." (183 A.at 622)

Is is noteworthy that the attack in Gallegher was based upon the "due course of law" provision of the State Constitution and not upon the Equal Protection Clause of the Fourteenth Amendment. This case is of first impression here as a challenge of the Guest Statute on equal protection grounds.

The Silver case, relied upon in Gallegher, involved the Connecticut Guest Statute, much like ours, which was challenged on equal protection grounds. In Silver, it was stated that whether there had been a serious increase in the evils of vexatious litigation in automobile guest cases was for the Legislature to determine, and that the wisdom of legislation restricting liability in such cases was not the concern of the courts. The United States Supreme

Court upheld the Connecticut Statute in Silver stating:

> "In this day of almost universal highway transportation by motorcar, we cannot say that abuses originating in the multiplicity of suits growing out of the gratuitous carriage of passengers in automobiles do not present so conspicuous an example of what the Legislature may regard as an evil, as to justify legislation aimed at it, even though some abuses may not be hit. [Citations] It is enough that the present statute strikes at the evil where it is felt and reaches the class of cases where it most frequently occurs." (50 S.Ct. at 59)

This remains the last word of the United States Supreme Court on the subject.

On the authority of Silver, until Merlo, Guest Statutes like ours have been consistently upheld against constitutional challenges, including those founded upon the Equal Protection Clause: Roberson v. Roberson, 193 Ark. 669, 101 S.W.2d 961 (1937); Vogts v. Guerrette, 142 Colo. 527, 351 P.2d 851 (1960); Wrights Estate v. Pizel, 168 Kan. 493, 214 P.2d 328 (1950); Smith v. Williams, 51 Ohio App. 464, 1 N. E.2d 643 (1935); Perozzi v. Ganiere, 149 Or. 330, 40 P.2d 1009 (1935

Fulghum v. Bleakley, 177 S.C. 286, 181 S.E.30 (1935); Campbell v. Paschall, 132 Tex. 226, 121 S.W.2d 593 (1938); Shea v. Olson, 185 Wash. 143, 53 P.2d 615 (1936); Naudzius v. Lahr, 253 Mich. 216, 234 N.W. 581 (1931); Pickett v. Matthews, 238 Ala. 542, 192 So.261 (1939); McMillan v. Nelson, 149 Fla. 334, 5 So.2d 867 (1942); Delaney v. Badame, 49 Ill.2d 168, 274 N.E.2d 353 (1971).

The Merlo case broke the pattern last year, reflecting a growing judicial impatience with, and disapproval of, Guest Statutes in general.. See cases collected at 2 Harper & James, The Law of Torts, § 16.-15, n.3 (Supp. 1968). In Merlo, the Supreme Court of California held that, under today's changing conditions, its Guest Statute denies equal protection of the laws, under both Federal and State Constitutions, to non-paying automobile guests. The rationale of Merlo is that the classifications which the Guest Statute creates, between those denied and those permitted recovery for negligently in-

flicted injuries,[6] bear no substantial and rational relation [7] to the Statute's traditionally recognized purposes of protecting the hospitality of host-drivers and of preventing collusive lawsuits. In rejecting the protection-of-hospitality justification, the Court cited such considerations as the greatly changed conditions since the 1930's arising from almost universal automobile liability insurance coverage. [8] In rejecting

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6. The distinctions being: (1) between gratuitous guests and paying passengers; (2) between automobile guests and other social guests; and (3) between different subclasses of automobile guests.

7. It is noted that the traditional equal protection "rationality" standard, and not the "strict scrutiny" standard, is applied in the testing of a Guest Statute against the Equal Protection Clause. See Brown v. Merlo, 106 Cal.Rptr. at 392, 506 P.2d at 216, n. 2; Tisko v. Harrison, Civ.App. Texas 500 S.W. 2d 565 at 571 (1973); Husband M. v. Wife M., Del.Supr., 321 A.2d 115 (1974).

8. "First, if the characterization of an injured guest's lawsuit as an act of 'ingratitude' ever had general validity, its rationality has been completely eroded by the development of almost universal automobile liability insurance coverage in recent years. Whereas, in the late 1920's and 1930's the statute's operation might realistically have been viewed as relieving most generous hosts from potentially great personal expense, today, with the widespread prevalence of insurance

the collusion-prevention thesis, the Court reasoned that in broadly prohibiting all automobile guests from instituting actions for negligence because a "small segment" of that class may file collusive suits, the Statute "presents a classic case of an impermissibly overinclusive [9.] classification scheme"; i.e., a statutory classification that "imposes a burden upon a wider range of individuals than are included in the class of those tainted with the mischief at which the law aims". The Court went on to say in this connec-

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coverage, it is the insurance company, and not the generous host, that in the majority of instances wins protection under the guest statute. Thus, in a day in which nearly 85 percent of automobile drivers carry liability insurance, the statute can no longer sequester the defense that it is a necessary means to thwart 'ungrateful' guests. In plain language, there is simply no notion of 'ingratitude' in suing your host's insurer." (106 Cal.Rptr. at 397, 506 P.2d at 221)

9. The theory is that "overinclusive classifications" are unreasonable classifications and violative of equal protection because they "fly squarely in the face of our traditional antipathy to assertions of mass guilt and guilt by association". Tussman & tenBroek, The Equal Protection of the Laws, 37 Cal.L.Rev. 341, 351-352 (1949); Note, Developments in the Law -- Equal Protection, 82 Harv.L. Rev. 1065, 1086-1087 (1969).

tion: "Instead of confirming its disability to those who actually institute collusive suits, the provision reaches out beyond such persons and burdens the great number of honest automobile guests"; and it said "Such a statute does not treat similarly situated individuals in like manner, but instead reaches out beyond the individuals 'tainted with the mischief' at which a statute is directed, and imposes its burden on innocent individuals who do not share the condemning characteristics"; and the Court concluded that " * * * in barring suits by all automobile guests simply to protect insurance companies from some collusive lawsuits, the guest statute exceeds the bounds of rationality and constitutes a denial of equal protection. (106 Cal.Rptr. at 403, 506 P.2d at 227-228).

These novel, scholarly, and thoughtful rationales and conclusions in Brown v. Merlo have aroused a spirited dichotomy and wide divergence of judicial opinion in the several cases in which Guest Statutes have been tested against the Equal Protection Clause since Merlo appeared.

The Court of Civil Appeals of Texas

unanimously declined to follow Merlo, and upheld the Texas Guest Statute. Tisko v. Harrison, Civ.App. Texas, 500 S.W.2d 565 (1973). The Supreme Court of Kansas, in a 4-3 decision, adopted the basic rationale and conclusion of Merlo, and held the Kansas Guest Statute violative of Federal and State equal protection constitutional guaranties. Henry v. Bauder, 213 Kan. 751, 518 P.2d 362 (1974). The Supreme Court of Utah declined to follow Merlo, and unanimously upheld the Guest Statute of that State against a similar equal protection assault. Cannon v. Oviatt and Martin, Utah Supr., 520 P.2d 883 (1974). The Supreme Court of Iowa, in a 5-4 decision, rejected the Merlo approaches to the problem and upheld the Iowa Guest Statute as constitutional under the Equal Protection Clause, Keasling v. Thompson, Iowa Supr., 217 N.W.2d 687 (1974). The Supreme Court of North Dakota, declining to test their Guest Statute under the Federal Constitution, but following the Merlo approaches, unanimously found their Statute violative of the "arbitrary classifications"

provision of the State Constitution in view of changing conditions occurring since the Statute's enactment in 1931. Johnson v. Hassett, N.D.Supr., 217 N.W.2d 771 (1974).

This contrariety of judicial opinion revolves basically around the question of whether the elimination of a Guest Statute, in the light of changing conditions, is within the realm of judicial action founded upon supposition and few facts, or whether it is more properly within the realm of legislative action founded upon empirical study.

It is clear from the learned but conflicting views appearing in the cases decided since Merlo that the question of the present constitutionality of a Guest Statute such as ours, under the Equal Protection Clause, is at least "fairly debatable".

[2-4] Having reached that conclusion, we become mindful of the traditional self-restraint of this Court whenever it becomes engaged in testing the constitutionality of an act of the General Assembly. Such self-imposed

limitation has been expressed by this Court in varying but consonant terms: Legislative acts should not be disturbed except in clear cases, and then only upon weighty considerations; a legislative enactment is cloaked with a presumption of constitutionality and should not be declared invalid unless its invalidity is beyond doubt. Klein v. National Pressure Cooker Co., Del.Supr., 31 Del.Ch. 459 64 A.2d 529 (1949). Every presumption is in favor of the validity of a legislative act and all doubts are resolved in its favor; and if the question of the reasonable necessity for regulation is fairly debatable, legislative judgment must be allowed to control. State v. Hobson, Del.Supr., 7 Terry 381, 83 A.2d 846 (1951). There is a strong presumption of constitutionality attending a legislative enactment which, unless the evidence of unconstitutionality is clear and convincing, the court will be reluctant to ignore. State Highway Dept. v. Delaware Power & Light Co., Del.Supr., 39 Del.Ch. 467, 167 A.2d 27 (1961).

One who challenges the constitutionality of a statute has the burden of overcoming the presumption of its validity. State v. Brown, Del.Supr., 195 A.2d 379 (1963).

[5] In the area of equal protection especially,courts have traditionally afforded legislative classifications a presumption of reasonableness and constitutionality where discrimination is not based upon race, color, religion, ancestry, or other "inherently suspect" classification requiring a more "strict scrutiny". 1 Antieau, Modern Constitutional Law § 8.81, p. 630 (1969). A statutory discrimination or classification will not be set aside if any state of facts reasonably may be conceived to justify it. McGowan v. Maryland, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961); Aetna Casualty & Surety Co. v. Smith, Del. Supr., 36 Del.Ch. 391, 131 A.2d 168 (1957).

Applying these tests: We are not persuaded that the evidence of unconstitutionality of the Guest Statute is "clear and convincing";

or that the appellants have succeeded in overcoming the presumption of its constitutionality and validity; or that no state of facts may reasonably be conceived to justify the statutory classification under present-day conditions.

We share the view upholding the constitutionality of Guest Statutes against the force of the Merlo rationale. If the rule of Silver, the highest present authority on the subject, is to be changed and the strictures of the Fourteenth Amendment extended in this area of the law, we shall await the views of the United States Supreme Court on the subject.

On the basis of the record before us, even on the basis of information of which we might take judicial notice, we are unable to say that there are no longer any evils to be corrected, or permissible objectives to be accomplished, by the Guest Statute. Whether the concept of hospitality-protection or collusion-prevention has been so eroded by changing conditions, as to have disappeared

as acceptable justification for the Guest Statute, is a problem more appropriate for legislative solution than for judicial determination. The General Assembly has access to relevant information bearing upon these matters more significant than any afforded this Court, bound as it is by the limitations of the record of this judicial proceeding.

[6,7] The balancing of intangibles, such as are involved in the Merlo approaches, is a proper legislative function. As to the collusion-prevention thesis, for example, the General Assembly must weigh the advantages of barring fraudulent guest claims against the disadvantages of also barring honest guest claims.[10] The balancing of competing advantages and disadvantages is also fundamentally a legislative function. If the Guest Statute has become unacceptably unwise and unfair under

10. An analogous problem is dealt with in the Statute of Frauds in which it is assumed that the advantage of barring fraudulent claims of certain classes of oral contracts outweighs the disadvantages of barring honest claims on such contracts.

current facts of life, it is for the General Assembly to act with respect to this Statute which it created more than 40 years ago. The wisdom of legislation is not within our realm; only the General Assembly may rectify legislation manifesting itself by hindsight as unwise. The appellants, and all who share increasing disillusionment with the Automobile Guest Statute under present conditions, must address themselves to the General Assembly. For this Court to abolish the Guest Statute because of charged conditions would, in our view, amount to impermissible judicial legislation.

Accordingly, we hold that the appellants have not shown the Delaware Automobile Guest Statute, even in its present day operation, to be in contravention of the Equal Protection Clause of the Federal Constitution.

III.

[8] The injured minor plaintiff in this case was six years old at the time of the accident.

The plaintiffs contend that a child of such tender years is incapable of being a "guest" within the meaning of the Guest Statute. The argument is that the word "guest" implies one who is offered and then accepts a free invitation from a host; that in order to accept such offer, the "guest" must be capable of knowingly accepting the invitation; and that a child six years of age is incapable of knowingly making the necessary consent. In support of that position, the plaintiffs cite Rosenbaum v. Raskin, 45 Ill2d 25, 257 N.E.2d 100 (1970); Smith v. Kauffman, 212 Va. 181, 183 S.E.2d 190 (1971); and Plumley v. Klein, 31 Mich.App. 26, 187 N.W.2d 250 (1971). The defendant, in opposition, relies upon Lynott v. Sells, Del.Super., 2 Storey 385, 158 A.2d 583 (1958) and cases cited therein.

We do not reach the question of whether knowing acceptance of an invitation is always necessary to create a guest relationship.

The key fact here is that, at the time of the accident, the plaintiff child was riding

with the defendant grandmother with the express consent of the child's mother. We hold, as did the Superior Court in Lynott upon which the Court below relied, that where there is express consent by a parent, a child of tender years is subject to the provisions of the Guest Statute. Considering the purposes of the Statute, this is the better rule, and is the weight of authority. See Chancey v. Cobb, 102Ga.App. 636, 117 S.E.2d 189 (1960); Wood v. Morris, 109 Ga.App. 148, 135 S.E.2d 484 (1964); Favatella v. Poulsen, 17 Utah 2d 24, 403 P.2d 918 (1965); Whitfield v. Bruegel, 134 Ind.App. 636, 190 N.E.2d 670 (1963); Coleman v. Guarantee Reserve Life Ins. Co., 5 Cir., 337 F.2d 288 (1964); Horst v. Holtzen, 249 Iowa 958, 90 N.W.2d 41 (1958). To hold otherwise would be to deny the existence of a fundamental concept of our jurisprudence: that parently permission and consent may enable a minor to act legally. To hold otherwise would unjustly prevent recovery by an older sibling, while permitting recovery by the younger for the same negligence.

In so concluding, we understand, of course, the humane rationale of the decisions to the contrary upon which the plaintiffs rely. Because application of the Automobile Guest Statute so often results in harsh, unfair, and unreasonable results, courts have shown a general tendency to carve out exceptions to the operation of the Statute in the interest of justice. Our own courts have demonstrated that tendency. See, e.g. Engle v. Poland, Del.Super.,8 Terry 365, 91 A.2d 326 (1952); Robb v. Ramey Associates, Inc., Del.Super., 1 Terry 520, 14 A.2d 394 (1940); Truitt v. Gaines, D.Del., 199 F.Supp. 143 (1961). As a matter of policy, however, we do not favor further judicial creation of exceptions to the Statute. If, as many believe, the Delaware Automobile Guest Statute leads so often to unreasonable and unjust results and should be repealed forthwith, let its evils stand revealed to the General Assembly without further judicial effort to avoid a bad law by patchwork exceptions.

We conclude that there was no error below in holding the minor plaintiff subject to the Guest Statute.

IV.

[9] Finally, the plaintiffs contend that the benefit derived by the defendant grandmother, by reason of the companionship of the child, was sufficient to take the case out of the Guest Statute.

This is a classic example of the type of legal meandering often engaged in to bypass a Statute considered by many to be archaic and unjust. Of course, benefit to the driver is the crucial factor in determining whether a passenger in any given circumstance is a "guest without payment". Mumford v. Robinson, Del. Supr., 231 A.2d 477 (1967). But the intangible "benefit" asserted here is so ethereal as to merit no further comment.

* * *

Affirmed.

CERTIFICATE OF SERVICE

AND NOW, this 1st day of October, 1982, I hereby certify that all parties required to be served have been served copies of the foregoing Jurisdictional Statement and that service was made pursuant to U.S. Sup. Ct. Rule 28.3 by personal service, by delivery of three copies thereof to the following:

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